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Far Beyond Nuremberg: Steps Toward International Criminal Jurisdiction

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Special Comment

FAR BEYOND NUREMBERG: STEPS TOWARD INTERNATIONAL CRIMINAL JURISDICTION

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> While the defendants and the prosecutors stand before you as individuals, it is not the triumph of either group alone that is committed to your judgement. . . .
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> . . . [T]he refuge of the defendants can be only their hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.[1]

Examining the relics and debris of recent international conferences on pollution and skyjacking, one is inclined towards some gloomy observations about the limitations of international legal institutions. If the creation of substantive international criminal law appears to lag behind international moral indignation, the chances for the establishment of an international criminal court are so far behind the scholarly perception of its need as to be clear out of sight. Nevertheless, the gloom which totally obscures the distant vision of a great world trial court with jurisdiction over persons accused of certain crimes does not hide the glow of some modest achievements. The theme of this paper is that although the goal of creating a great court is as remote today as when it was first proposed more than half a century ago,[2] the emergence of a number of smaller courts of limited jurisdiction may suggest the model of a court system eventually coordinated by an international appellate court.

The godfather of international criminal jurisdiction is the law of war. This body of law is composed of humanitarian rules which

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[1] R. H. Jackson, Opening Statement of the Prosecution, Nüremberg Trials (1945).

[2] Council of the League of Nations (Feb., 1920); V. PELLA, THE INTERNATIONAL ASSOCIATION OF PENAL LAW AND THE SAFEGUARDING OF PEACE 8-12 (1947).

are concerned with saving lives and reducing suffering, rather than with fixing the responsibility for aggression or adjudicating the principal issue in the conflict. The central tenet of this body of law, which has been growing by custom and convention since 1863, is that behavior which is criminal under the law of all civilized nations—such as murder, torture, rape and pillage—is not legitimized by war.[3] Because the international law of war is usually effectuated through domestic legislation, its influence on the public consciousness is minimal.[4] Nevertheless, the law of war clearly establishes the principle that individual persons can be liable for criminal acts before an international tribunal.

The jurisdiction of the law of war has been gradually expanded from concern for the wounded and sick at sea during wartime,[5] to all the wounded and sick during wartime,[6] to the rules of belligerent occupation[7] and, after the First World War, to concern for the treatment of war prisoners.[8] Subsequent to the Second World War, international criminal jurisdiction was extended to the protection of civilians during wartime.[9] In addition to the law of war, which is codified in the four Geneva Conventions of 1949, the momentum of post war concern for international criminal justice also extended to crimes against peace, war crimes, genocide, slavery and piracy.[10] By the time that unlawful seizure of aircraft was declared an international crime in 1970,[11] the universality of concern had been spent and nations once again became cynical about the possibility of enforcement.

Parallel with the development of the conventional substantive law has been the largely academic development of a single great international trial court. A brief review of the dream of a great

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[3] *See generally* Miller, *An Introduction to the Law of War*, BOSTON B.J. (Nov. 1970).

[4] Article 129 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter cited as GPW-1949] requires signatories to enact legislation necessary to provide penal sanctions for persons committing grave breaches such as torture or willful killing.

[5] The first Geneva Convention Relative to the Wounded and Sick at Sea was drafted in 1864.

[6] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1960).

[7] Hague Regulations (1907).

[8] GPW-1949, *supra* note 4.

[9] Geneva Convention for the Protection of Civilian Persons in Time of War (1949).

[10] *See* note 16 *infra*.

[11] *Id.*

court properly begins with the first Convention for the Creation of an International Criminal Court in 1937. Thirteen European nations signed a convention which would have created international jurisdiction over terrorism.[12] Of the five nations which today are permanent members of the Security Council of the United Nations, only the U.S.S.R. signed the original Convention. It did so subject to so broad a reservation that its accord was nearly meaningless. In any event the outbreak of World War II prevented ratification of the Convention by any of the signatories.

In 1944 the United Nations War Crimes Commission approved a draft of a Convention for the Establishment of a United Nations War Crimes Court.[13] The Nüremberg tribunal was, of course, ultimately established as a temporary court of limited jurisdiction, but the matter of a permanent court was laid to rest until the post war United Nations Draft Statute for an International Criminal Court in 1953.[14] Unfortunately for the progress of the court concept, the General Assembly Committee on International Criminal Jurisdiction was also charged with the responsibility for drafting a substantive international criminal code. It got as far as "A" for "aggression" before it was hopelessly bogged down.[15]

The project remained in the cold war deep freeze for a decade until it was thawed out by the World Rule Through Law Association in 1964. For five years the Association's International Criminal Law Commission labored to lay the groundwork for a fresh start. The result was a work by Australian Professor Julius Stone and American Professor Robert K. Woetzel entitled "Toward a Feasible International Criminal Court." The academicians, however, were unable to revive diplomatic interest in the project. In 1971, the First International Criminal Law Conference was convened by Professor Woetzel at "Wingspread" in Racine, Wisconsin to resume the work of the United Nations committee. It produced a draft convention on international crimes which essentially codified crimes which had previously been acknowledged through international conventions.[16] It also produced yet

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[12] LEAGUE OF NATIONS Doc. 546(1), M. 383(1) (1937).
[13] U.N. Doc. A/CN 4/7/Rev. 1 (1949).
[14] 9 U.N. GAOR, Supp. 12, U.N. Doc. A/2645 (1954).
[15] G.A. Res. 1187, 12 U.N. GAOR Supp. 18, at 52, U.N. Doc. A/3804 (1957).
[16] The crimes include:

another draft statute for an international criminal court distinguished by an investigating magistrature which would have a grand jury function unique in international law.[17] At the present time Professor Woetzel is evangelizing the Wingspread drafts among scholars who may be expected to draft the law when and if the ideal of a grand court is again seriously considered by the world diplomatic community.[18]

In the meantime, there has been considerable progress among the Lilliputians of international criminal jurisdiction. Stone and Woetzel catalogued historical instances where individuals appeared before international tribunals[19] in considerable detail. Most of these were temporary tribunals involved in the redress of war crimes. These include a 1907 treaty among five Latin American countries which provided access to a Central American Court of Justice, a 1922 mixed commission to act upon the complaints of German Polish minorities in Upper Silesia, the hearings of the United Nations Trusteeship Council, and the European Court of Human Rights established by the Council of Europe in Strasbourg in 1955.[20]

More recently the Court of Justice of the European Communities has been established to cope with some of the problems of the Common Market.[21] (The entry of Great Britain into the

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a. Crimes against peace as they are defined in Article 6(a) of the Charter of the International Military Tribunal for the Trial of Major War Criminals of 8 August 1945.
b. War crimes as they are defined in Article 1(a) of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968.
c. Genocide and other crimes against humanity as they are defined in Article 1(b) of the Convention on the Non-applicability of Statutory Limitations and in the Genocide Convention of 9 December 1968.
d. Slavery as defined in Articles 3 and 7(c) of the Supplementary Convention on the Abolition of Slavery of 7 September 1956.
e. Piracy as defined in Article 15 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

In addition to the crimes with an existing conventional basis the Wingspread scholars optimistically presumed that the international community would soon declare international drug traffic, pollution and the kidnapping of diplomats to be international crimes.

[17] Mueller, *Two Enforcement Models for International Criminal Justice,* in 25 MEMORIES PUBLIES PAR LA FACULTE DE DROIT DE GENEVE (1969) [hereinafter cited as Mueller].

[18] A small-scale follow-up to Wingspread was held in Bellagio, Italy in 1972.

[19] The jurisdiction of the moribund International Court of Justice at The Hague is over consenting states, not individuals.

[20] J. STONE & R. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 72 (1970).

[21] A. CAMPBELL, COMMON MARKET LAW ch. 6, at 7 (1962).

market is likely to exercise a profound juridical influence on the procedures of the court.) Belgium, France, Germany, Italy, Luxembourg and the Netherlands have surrendered some of their sovereign civil jurisdiction to a Court of Justice with special jurisdiction. National law has been somewhat subordinated to the community law of the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community. The Federal Republic of Germany's "Supreme Restitution Court," which continues to hear restitution claims from all of the countries occupied by Nazi Germany, has an international bench which rotates among three sittings. A former Nüremberg prosecutor observed at Wingspread that "there are in existence today functioning tribunals composed of judges of different nationalities, enforcing conventions agreed upon by a number of sovereign states and having binding jurisdiction . . . over nationals of different countries." These international courts have proved effective in disposing of thousands of contentious disputes without arousing either public opposition or even much attention.[22]

It is intellectually satisfying to extrapolate from the particular to the general. If, in a piecemeal fashion, a kind of international criminal code already exists and international tribunals with criminal jurisdiction actually function from time to time; why should there not be a grand international court to apply a codified body of law? The simple answer is that the dream bears no relationship whatever to the dynamic process of the creation of either national or international laws and courts.

Courts come into being only where there are claims and controversies to adjudicate. The International Court of Justice, whose naked docket mocks its very existence, may well be the exception which proves the rule.[23] Absent central political power to create adjudicating tribunals as an adjunct of government—the normal condition of international law—courts should be expected to be created as required, and only as required. At the Fifth World Conference on World Peace Through Law in Belgrade in

[22] Ferenz, The Forgotten International Courts (unpublished paper presented at Wingspread 1971).

[23] Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971).

1971, 3000 lawyers witnessed a mock trial before an International Court of Justice with fictionally expanded jurisdiction. The case hypothetically supposed the fall on Yugoslavia's National Assembly Building of a spaceship assembled in Italy with Japanese parts and launched by the United States. It was stipulated that great damage was done to the building, a Venezuelan citizen was injured, and an Ethiopean killed. Chief Justice Burger presided over the international panel of jurors. However, a world court with criminal jurisdiction is, in fact, more likely to arise as an appellate court than as a trial court. A day will come in the not-too-distant future when a multitude of international tribunals created by treaty to apply an equal number of bodies of law will co-exist uneasily side-by-side. In all likelihood the majority of them will have civil jurisdiction. In some instances, such as the regulation of pollution of international waterways, the line between civil and criminal is likely to be blurred—as is often the case in taxation and regulatory law. When the interests of justice demand a degree of procedural consistency among the trial courts, a great court with appellate jurisdiction from supernational regional tribunals may become a reality.

Some scholars, reflecting upon the retrograde pace of an international criminal court, have thought to change the enforcement model. Looking back at Nüremberg, Professor Mueller has observed that the old model envisaged an international tribunal with the power to dispense retributive justice. His new model, which significantly influenced the Wingspread conference, envisaged the prevention of international crime through indictment procedures which, albeit *ex parte*, would have a coercive effect on potential wrongdoers.[24] The attractiveness of the model is that it substitutes the partial frustration of a world community, which is oblivious to allegations of injustice, for the total frustration of a world court which is without the power to punish proven injustice. The drawback is that no one wants it, and it is not at all certain that anyone needs it. It is far more practical, it would seem, to press for the incorporation of an international adjudicatory mechanism in every convention on international crimes. Create these, and a great court will follow.

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[24] Mueller, *supra* note 17, at 115.